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No. 86-789

In The
Supreme Court of the United States

October Term, 1986

American Multi-Cinema, Inc.,
Petitioner,
v.
Syufy Enterprises,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

Petitioner's Reply Memorandum

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Syufy's counterstatement of the case attempts to create a factual conflict by relying upon evidence that was rejected by the jury. AMC was the prevailing party at trial. All reasonable inferences from the evidence must be construed in favor of AMC. Syufy's tactic of picking and choosing among isolated facts and judicial comments is unpersuasive.

A substantial portion of the counterstatement is devoted to a discussion of Syufy's interpretation of its claim against AMC. Syufy's belief regarding the strength of its evidence is of no moment and cannot create a factual conflict. Both the

judge and the jury rejected Syufy's contentions. [1] The trial judge, in affirming the verdict and denying Syufy's motion for judgment not withstanding the verdict or new trial, found that there was "substantial evidence" to support AMC's counterclaim and that Syufy's proof was "unconvincing" [Appendix B-14]. [2]

I

AMC'S CONSPIRACY TO MONOPOLIZE CLAIM IS NOT BARRED OR MOOT

Syufy employs convoluted logic to argue that the district court's grant of a motion for directed verdict on AMC's Section 1 claim against Syufy operates as *res judicata* to preclude AMC's Section 2 conspiracy to monopolize claim. This argument ignores the principle that inconsistent verdicts between a Section 1 conspiracy in restraint of trade and a Section 2 conspiracy to monopolize are not grounds for an appellate court to overturn a verdict. *See United States v. National City Lines*, 186 F.2d 562, 569 (7th Cir. 1951).

II

GRANTING AMC'S PETITION FOR WRIT OF CERTIORARI WOULD CHANGE THE RESULT BASED UPON THE NINTH CIRCUIT'S AMENDED DECISION

The Ninth Circuit initially stated that AMC was required to prevail on each of four "claims" submitted to a jury in or-

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[1] Even if there was some merit to Syufy's claim of anti-competitive conduct by AMC, such conduct would not bar AMC's recovery. *See Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951).

[2] Syufy devotes a large portion of its counterstatement to a discussion of a proposed motion picture exhibitor cooperative. Syufy does not, however, disclose that the cooperative was thoroughly reviewed by AMC with (1) the Department of Justice, Antitrust Division, (2) nearly all distributors and exhibitors and (3) was never implemented or operational [RT 1628, 1655-6, 1671-2, 1685-6, 1857, 1859, 1972, 2095, 2429]. The jury, the district court judge and the Ninth Circuit found that the proposed cooperative did not violate the antitrust laws.

der to sustain the judgment. 783 F.2d at 891. The Ninth Circuit amended its decision to hold that although AMC presented four "theories" of liability, AMC's judgment was based on three claims for relief: monopolization, attempted monopolization and a conspiracy to monopolize. Two of the "theories" related to the monopolization claim. [3] The Ninth Circuit held that the evidence was sufficient to sustain AMC's monopolization claim [Appendix A-3-10]. The Ninth Circuit also held that there was substantial evidence to uphold AMC's attempted monopolization claim [Appendix A-14-16]. The judgment in favor of AMC on its conspiracy to monopolize claim was vacated because the Ninth Circuit apparently concluded AMC failed to prove co-conspirator participation in the conspiracy or co-conspirator specific intent. If this court grants AMC's petition for writ of certiorari and reverses the Ninth Circuit's erroneous analysis of a conspiracy to monopolize claim, the litigation will conclude with a final judgment being entered in favor of AMC.

III

THE NINTH CIRCUIT INCORRECTLY APPLIED THE STANDARD OF PROOF FOR ANTITRUST CONSPIRACIES

Syufy contends that the Ninth Circuit applied the same standard to prove a Section 1 and 2 conspiracy. If the Ninth Circuit had applied this standard, judgment would have been entered in favor of AMC. Syufy entered into contractual arrangements with distributors which granted Syufy unreasonable and excessive clearance [Appendix A-10]. This unlawful agreement between Syufy and the co-conspirators (the distributors) established a conspiracy in violation of

[3] If either of these two factual theories were sufficient to support the verdict, judgment on the monopolization claim must be entered in favor of AMC. *See Baumler v. State Farm Mutual Automobile Insurance Co.*, 493 F.2d 130, 134 (9th Cir. 1974) ("The jury is presumed to have acted correctly; thus where there are two alternative factual theories which might support the verdict, the verdict will be upheld if there is sufficient evidence to support either theory.")

Section 1. Unless analysis under Section 2 differs, AMC proved a Section 2 conspiracy. This court has held that evidence virtually identical to that presented by AMC establishes a Section 2 conspiracy. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) this court stated "each discriminatory contract constituted a conspiracy between licensor and licensee." *Id.* at 160. The same standard was reiterated in *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948) wherein this court held that the motion picture distributors' execution of film license agreements "brought the distributors into unlawful combinations with the Schine defendants." *Id.* at 116. AMC satisfied its burden to prove a Section 2 conspiracy by proving that the distributors signed film license agreements with Syufy. The Ninth Circuit ignored *Paramount* and *Schine* and created an additional element to prove a conspiracy to monopolize. This court should grant AMC's petition for writ of certiorari to resolve the Ninth Circuit's erroneous creation of a conflict in the standard of proof between a Section 1 and Section 2 conspiracy.

IV
PROOF OF SPECIFIC INTENT IS NOT NECESSARY

Syufy claims that specific intent is necessary to prove a conspiracy to monopolize. [4] For this proposition, Syufy relies upon *American Tobacco Company v. United States*, 328 U.S. 781 (1946). The holding in *American Tobacco* is exactly contrary to Syufy's argument. This court held that no specific intent was required if the co-conspirators possessed monopoly power. "To read the passage as demanding any 'specific'

[4] The argument rings hollow in light of the position advanced by Syufy's counsel in a recent American Bar Association Publication. *See* Crew, *Matsushita v. Zenith: The Chicago School Teaches the Supreme Court a Dubious Lesson*, 1 Antitrust 11, 15 (1986) (To prove a Section 2 conspiracy, "[i]t does not matter that defendants and their accomplices harbored different motives or were in different markets.") Specific intent is not an element of a Section 2 conspiracy.

intent, makes nonsense of it ..." *Id.* at 814. Similarly, in *United States v. Griffith*, 334 U.S. 100 (1948) the court held that specific intent is necessary only where the "acts fall short of the results condemned by the Act." *Id.* at 105. The results condemned by the Act were present — Syufy achieved monopoly power [Appendix A-8-9].

Syufy's argument does not address the facts that were proven in this case. Syufy possessed monopoly power. If one of the conspirators possesses monopoly power, proof of specific intent is not required.[5] *See Paramount* at 172-3.

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[5] One commentator has analyzed the different elements in proving a conspiracy to monopolize depending upon whether the conspirators possess monopoly. The commentator concluded that based upon *Griffith* and *American Tobacco* proof of specific intent in a conspiracy to monopolize case is unnecessary when the co-conspirators possess monopoly power. *See* Holmes, *Conspiracies to Monopolize: A Decisional Model*, 42 Ohio St.L.Rev. 731, 747-8 (1981).

CONCLUSION

For each of the reasons stated, this court should grant AMC's petition for writ of certiorari.

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